UPPER MOHAWK COMMUNITY COUNCIL
OREGON NATURAL RESOURCES COUNCIL

IBLA 86-607 Decided October 3, 1988

Appeals from separate decisions of the Eugene District Office, Bureau of Land Management, denying protests against the award of the contract for the Bunker Combo Timber Sale, Unit M-85-7.3, Tract E-85-10.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals

   Under 43 U.S.C. § 1181a (1982), revested Oregon and California Railroad Grant land which is classified as timber land must be managed under sustained yield principles for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, contributing to the economic stability of local communities and industries, and providing recreational facilities.

2. Environmental Policy Act -- Environmental Quality: Environmental Statements -- Timber Sales and Disposals

   A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

3. Endangered Species Act of 1973: Generally -- Endangered Species Act of 1973: Section 7: Generally -- Endangered Species Act of 1973: Section 7: Critical Habitat -- Timber Sales and Disposals

   Under regulations promulgated at 50 CFR Part 402, consultation with the Fish and Wildlife Service is required with respect to a timber sale conducted by the Bureau of Land Management only when BLM determines that the timber sale would affect a listed species or its habitat, unless the sale is a major Federal action significantly affecting the quality of the human environment within the meaning of 42 U.S.C. § 4332(2)(C) (1982).

4. Migratory Bird Conservation Act: Generally -- Timber Sales and Disposals

   The mere award of a timber contract by the Bureau of Land Management does not violate the Migratory Bird Treaty Act.

APPEARANCES: Michael Axline, Esq., and Sid Maurer, Eugene, Oregon, for appellants; Melvin D. Clausen, District Manager, Eugene District Office, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LYNN

The Upper Mohawk Community Council (UMCC) and the Oregon Natural Resources Council (appellants) have appealed from separate decisions of the District Manager, Eugene District Office, Bureau of Land Management (BLM), dated February 5, 1986, denying identical protests to the Bunker Combo Timber Sale. This sale would involve clearcutting 31 acres of old-growth timber 1/ identified as unit M-85-7.3, within Tract E-85-10. 2/ The sale was stayed by BLM pending the resolution of an application for lease of the tract for park purposes filed by Lane County, Oregon, under the Recreation and Public Purposes Act, 43 U.S.C. §§ 869 -- 869-4 (1982) (R&PP Act). 3/ When the county withdrew its R&PP Act application, appellants sought a stay of the sale from the Board. By order dated February 2, 1987, a stay was denied. 4/

1/ Old-growth timber is defined by BLM as timber at least 196 years old.
2/ The Bunker Combo Sale was composed of 4 units, M-85-7.1, M-85-7.2, M-85-7.3, and M-85-7.4. Only unit M-85-7.3 is involved in this appeal.
3/ All further references to the United States Code are to the 1982 edition.
4/ Appellants' motion for a stay was based in part on the pendency of an application by UMCC under the R&PP Act. This application was filed when the county withdrew its application. By separate decision issued today, the Board affirms BLM's denial of UMCC's application. Upper Mohawk Community Council, 104 IBLA 389 (1988).

[1] Unit M-85-7.3 is revested Oregon and California railroad grant (O&C) land. Under the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937, 50 Stat. 874, 43 U.S.C. § 1181a, such land, if classified as timber land, must be managed by the Secretary of the Interior under sustained yield principles "for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities." See Curtin Mitchell, 82 IBLA 275 (1984); In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983).

Appellants first argue that in approving this timber sale, BLM violated the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4335 (NEPA). NEPA requires Federal agencies to prepare an environmental impact statement (EIS) for all major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Appellants argue that the Bunker Combo Sale was a major Federal action significantly affecting the quality of the human environment and that BLM was required to prepare an EIS for this sale. 5/

BLM provides the following account in support of its assertion that it has fulfilled its NEPA obligations. In May 1983 BLM prepared an EIS for a 10-year (1984-1993) timber management plan for the Upper Willamette and Siuslaw Sustained Yield Units in the Eugene District. This EIS considered the impacts of ten alternative courses of action. In a September 1983 Record of Decision, BLM noted that most of the land covered by the May 1983 Eugene District EIS was O&C land in rejecting alternatives presented in the final EIS which would have provided greater protection for old-growth timber on the grounds that these alternatives would have undesirable socioeconomic impacts. Instead, the Record of Decision adopted the fifth alternative, which would create an east-west corridor linking older forest habitat between national forest lands in the Coast and Cascade Ranges and systems of wildlife habitat in BLM's Roseburg and Coos Bay Districts. The alternative adopted in the final EIS allowed the logging of some old-growth timber. In addition, BLM states that it "tiered" EA OR090-4-10 for the fiscal year 1985 timber sale plan for the Mohawk Resource Unit within the Eugene District and an August 1985 FONSI for the Bunker Combo Sale to the final 1983 EIS.

Regulations implementing NEPA and binding on all Federal agencies have been promulgated by the Council on Environmental Quality at 40 CFR Part 1500. Those regulations specifically provide for the tiering of environmental analyses in 40 CFR 1508.28:

5/ Appellants apparently argue both that BLM was required to prepare an EIS and an environmental assessment (EA) for the Bunker Combo Sale. BLM would be required to prepare an EIS or an EA for the Bunker Combo Sale only if it is determined that BLM was incorrect in its determination that a finding of no significant impacts (FONSI) was sufficient, as discussed infra.

> "Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:
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> (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

Tiering helps reduce duplication of effort and paperwork, and helps the agency focus on those issues which are ripe for decision at each level of environmental review. 40 CFR 1502.20, 1506.4.

The use of tiering does not automatically mean that an EIS is not necessary for actions of lesser scope or even for a site-specific action. The test for whether an EIS is required for any particular action is still whether that action, in itself, is a major Federal action that will have a significant effect on the human environment.

[2] In the present case, BLM determined that the Bunker Combo Sale would not have a significant effect on the human environment. This determination was set forth in its August 26, 1985, FONSI. 6/ In Glacier-Two Medicine Alliance, 88 IBLA 133, 140-41 (1985), we set forth the burden of proof required to overturn a FONSI:

> A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984). The party challenging the determination must show it was premised on a clear error

6/ In Kettle Range Conservation Group v. Berglund, 480 F. Supp. 1199 (E.D. Wash. 1979), the court upheld the Forest Service's determination that an individual sale within the area covered by a final programmatic EIS for the Kettle Range Planning Unit within the Colville National Forest did not require the preparation of an EIS. The court held that the preparation of the EIS for the Kettle Range Planning Unit satisfied the agency's obligations under NEPA and expressly determined that the individual timber sale at issue was not a major Federal action significantly affecting the quality of the human environment.

of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See generally id.; United States v. Albert O. Husman, 81 IBLA 271, 274 (1984); see also Curtin Mitchell, 82 IBLA 275 (1984); In re Otter Slide Timber Sale, 75 IBLA 380 (1983). Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal. See generally Oregon Shores Conservation Coalition, 83 IBLA 1 (1984).

Appellants attempt to sustain their burden of proof on appeal by arguing that BLM must consider both the "context" and "intensity" of the proposed action, citing 40 CFR 1508.27. Thus, appellants first contend that the decisionmakers must consider the "unique characteristics of the geographical area," 40 CFR 1508.27(b)(3). Appellants allege that the Bunker Hill area is geographically prominent and unique, being visible from several roads, and that the Bunker Hill treeline is especially prominent, having height and natural unevenness not found in the rest of the valley's second-growth that has resulted from previous clearcutting.

The decision record accompanying the Bunker Combo Sale FONSI and the FONSI itself reveal that BLM considered whether the area encompassed by the sale was unique or critical in several contexts, including whether it was required for plant and/or animal species survival, contained rare or endangered species, or had unique archeological, ecological, botanical, or wildlife values, as well as the effect clearcutting would have on the visual environment. BLM referred back to the 1983 final EIS for discussions of the effects of clearcutting, the specific impacts of clearcutting old-growth, and visual management areas. While admitting the Bunker Combo Sale area was old-growth timber and had special values for 30-50 local residents, BLM concluded there was nothing unique about this specific site. The 1983 final EIS and management plan for the Eugene District recognized that scientific information concerning the ecological significance of stands of old-growth timber was incomplete and, therefore, provided for the preservation of some old-growth stands. The areas to be preserved, the east-west corridor, were chosen to provide the habitat necessary for animal migration. The area of the Bunker Combo Sale was not in the east-west corridor and was not otherwise designated for preservation. BLM's response shows that the Bunker Hill area was also not considered geographically unique, because it was not topographically prominent, being surrounded within 6 miles by six mountains, which were at least 800, and at most 1,100, feet higher than Bunker Hill.

Furthermore, the record shows that BLM believed the need for recreational, research, and educational areas was satisfied by the existence of the Mohawk Research Natural Area, a similar area three miles away from Bunker Hill, and by the 28,000 acres of BLM-administered land in the Mohawk Valley, most of which is open for public recreation.

We find that the record in this case establishes that BLM considered whether the area of the Bunker Combo Sale had unique characteristics. Although appellants clearly disagree with BLM's determination that the area

did not have unique characteristics, they have failed to show error in BLM's determination.

Appellants next argue that 40 CFR 1508.27(b)(4) requires BLM to consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial." Appellants argue the proposed sale has been the focus of considerable public attention since it was first announced. Specifically, appellants contend the proposal has been the subject of 36 articles and 20 letters to the editor in local newspapers, 101 letters and telephone calls to BLM, and inquiries from both of Oregon's U.S. Senators.

In Glacier-Two Medicine Alliance, supra, the Board discussed the meaning of the phrase "highly controversial" under 40 CFR 1508.27(b)(4). We there held that the mere fact that persons or organizations oppose a proposed Federal action does not per se render the action "highly controversial." The term "highly controversial" refers to cases in which there is a substantial dispute as to the size, nature, or effect of the action, as distinguished from those cases in which there is merely disagreement over the decision itself. See also Foundation for North American Sheep v. United States, 681 F.2d 1172, 1182 (9th Cir. 1982); Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973). The controversy about a proposed action is not to be measured by the number of references to it appearing in the news media.

Appellants have not shown any dispute over the size, nature, or effect of the Bunker Combo Sale. Their sole argument relates to the opposition to the sale.

Appellants have failed to show that BLM's decision was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Furthermore, the record establishes that a careful review of the environmental problems was made, relevant environmental concerns were identified, and the final determination is reasonable in light of the environmental analysis. Accordingly, appellants have failed to sustain their burden of proof, and BLM's decision to issue a FONSI, rather than an EA or EIS, on the Bunker Combo Sale is sustained.

Appellants next contend that the timber sale violates the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (ESA), because BLM failed to consult with the Fish and Wildlife Service (FWS) concerning whether there were any threatened or endangered species in the area of the Bunker Combo Sale. Under 16 U.S.C. § 1536(c)(1), each Federal agency is required to "request of the Secretary [of the Interior] information whether any species which is listed or proposed to be listed may be present in the area of such proposed action." Although BLM determined that there are no threatened or endangered species in the area, appellant claims that the entire process was flawed because BLM failed to seek the opinion of FWS, citing Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).

[3] Regulations implementing the ESA have been published in 50 CFR Part 402. Section 402.12 requires consultation with FWS when a Federal action is a "major construction activity," which is defined in section 402.02 as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)]." (Brackets in original.) As we held supra, the protested timber sale is not such an action. Therefore, consultation with FWS was not required once BLM had determined through its own analysis that no threatened or endangered species or their habitat would be impacted by the timber sale. 7/

Finally, appellants contend that the timber sale would result in the violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 701-715s (MBTA). Section 703 of that Act provides that "it shall be unlawful at any time, by any means or in any manner to * * * kill [or] possess * * * any migratory bird [or] any * * * nest or eggs of any such bird." Appellants state that at least nine different species of birds found in the area of the Bunker Combo Sale are listed as protected under the MBTA. These species nest in the sale area, and appellants contend that their nests will be destroyed by harvesting the trees containing those nests.

[4] The mere awarding of a timber contract by BLM does not kill or possess any migratory bird, nest, or egg. Any possible violation of the MBTA would occur when logging actually takes place. The MBTA does not prohibit the award of a timber contract, although it might influence the timing of logging operations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

Will A. Irwin
Administrative Judge

7/ Thomas v. Peterson, supra, does not require a different conclusion. The action at issue there was determined to be a major Federal action as defined in 42 U.S.C. § 4332(2)(C). Therefore, the threshold for consultation set forth in 50 CFR 402.12 was met.